Transportation Management Corporation *and* Teamsters Local 829, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Jean Nelson. Cases 1-CA-17394 and 1-CA-17534

August 14, 1981

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND ZIMMERMAN

On March 4, 1981, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein.

We agree with the Administrative Law Judge's findings, including his finding that Respondent violated Section 8(a)(3) of the Act by constructively discharging employees for refusing to waive their right to strike. We also agree that Respondent constructively discharged Jean Nelson but disagree with his basis for this finding.

Respondent engaged in an unlawful written poll of its driver-employees to determine whether they would waive their right to strike for a 2-week period; retrieved the vehicles of the employees who refused to do so; sent a letter to all who refused which stated that unless they reported for work by a certain date, Respondent would assume they had no interest in working for it, and thereby constructively discharged those who did not report. The Administrative Law Judge included Nelson among those who refused to waive their right to strike, even though Nelson's response to the poll was to waive that right "under duress."

The record shows that, after Nelson waived her right to strike "under duress," Respondent permitted her to retain her vehicle, i.e., to continue working. Shortly thereafter, Nelson gave an interview to the local newspaper in which she stated that Respondent intended to intimidate employees by means of the poll, and accused Respondent's president, Zimmerman, of attempting to "stymie" the union organizing efforts. The day after her statements were published, Nelson was told to return her vehicle for "tests." Nelson responded that she was unable to bring the vehicle to Respondent because of a doctor's appointment, whereupon Respondent sent two employees to retrieve her vehicle. Respondent refused to assign another vehicle to Nelson and also reassigned her route to a new employee. Respondent contends that it did not ask Nelson to return to work because she had "caused problems" by requiring Respondent to send two employees to retrieve her vehicle. The record shows, however, that Respondent sent employees to retrieve the vehicles of every employee who refused to execute a strike waiver and thereby unlawfully constructively discharged said employees because of their refusal to assist it in its antiunion efforts. Respondent has not adduced any evidence showing the nature of those "problems," in that the retrieval of Nelson's vehicle met with "problems" not encountered by the retrieval of any other vehicles, or that the retrieval of her vehicle differed in any way from the retrieval of any other vehicles. Absent such evidence, we are left with a clear nexus between Nelson's published statements of opposition to Respondent's antiunion conduct and the imposition against her of the same discipline Respondent imposed on all who opposed that conduct. The record clearly supports the inference that the "problems" caused by Nelson's published statements were directly related to Respondent's attempt to stifle the Union's organizing efforts, and that Respondent violated Section 8(a)(3) of the Act by constructively discharging Nelson because of those statements.

AMENDED CONCLUSIONS OF LAW

We hereby affirm the Administrative Law Judge's Conclusions of Law as modified below:

1. Substitute the following for Conclusion of Law 7:

"7. (a) Respondent discriminated, in violation of Section 8(a)(3) and (1) of the Act, against the following employees by having constructively discharged each of them on April 28, 1980, for having refused and declined to waive their right to strike:

1. Anderson, Sally	17. Kane, Barbara
2. Ballard, Theresa	18. Leonard, Patricia
3. Belanger, Mary	19. Ludwig, Joanne

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Contrary to Respondent, there is no basis for finding that bias and partiality exists merely because the Administrative Law Judge resolved factual conflicts in favor of the General Counsel's witnesses. *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656 (1949).

4. Bower, Catherine
5. Budinger, Carol
6. Cassetta, Linda
7. Coutts, Janet
8. Dixon, Wendy
9. Duval, Cora
10. Dwyer, Sandra
11. Esposito, Janet
12. Greene, Davis
13. Hurley, Pauline
14. Hogsett, Clarisa
15. Houghton, Flora
16. Johnson, Judith
20. Macklin, Etta M.
21. Martinez, Claire
22. McCue, Lorraine
23. McIrvin, Mary G.
24. Motte, Lorraine
25. Mullaney, Linda
26. Musto, Marianne
27. Newton, Pamela
28. Nicolosi, Mary N.
29. O'Neil, Margaret
30. Robbins, Leila
31. Sherburne, Ruth
32. Smith, Connie
33. Switzer, Marlene
34. Vibert, Gail

"(b) Respondent violated Section 8(a)(3) and (1) of the Act by constructively discharging employee Jean Nelson for statements she made that are protected under the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge,[2] as modified below, and hereby orders that the Respondent, Transportation Management Corporation, Medford, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d) and reletter the subsequent paragraph accordingly:

"(d) Discriminating against employees for making statements which are protected under the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest due based on the formula set forth therein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT conduct any poll among you that is not in accordance with the standards and safeguards of the National Labor Relations Board or which violates the National Labor Relations Act.

WE WILL NOT tell you that your opportunities to work for us or to receive your pay depends upon whether you tell us of your intentions to strike or to engage in any other activity protected by the National Labor Relations Act.

WE WILL NOT discriminate against Jean Nelson, or any other employee, for making statements which are protected under the Act.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of any of the rights described above.

WE WILL offer immediate and full reinstatement to each of the following named individuals to their former job with us without loss of seniority or other rights and privileges or, if that job no longer exists, she will be offered a substantially equivalent job:

1. Anderson, Sally
2. Ballard, Theresa
3. Belanger, Mary
4. Bower, Catherine
5. Budinger, Carol
6. Cassetta, Lina
14. Hogsett, Clarisa
15. Houghton, Flora
16. Johnson, Judith
17. Kane, Barbara
18. Ludwig, Joanne
19. Macklin, Etta A.
20. Martinez, Claire
21. McCue, Lorraine
22. McIrvin, Mary G.
23. Motte, Lorraine
24. Mullaney, Linda

7. Coutts, Janet
8. Dixon, Wendy
9. Duval, Cora
10. Dwyer, Sandra
11. Esposito, Janet
12. Greene, Davis
13. Hurley, Pauline
25. Musto, Marianne
26. Nelson, Jean
27. Newton, Pamela
28. Nicolosi, Mary N.
29. O'Neil, Margaret
30. Robbins, Leila
31. Sherburne, Ruth
32. Smith, Connie
33. Switzer, Marlene
34. Vibert, Gail
35. Leonard, Patricia

WE WILL make whole, with interest, each of the individuals named above for all moneys lost as a result of their constructive discharges on April 28, 1980.

TRANSPORTATION MANAGEMENT CORPORATION

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: These cases were heard before me on December 15 and 16, 1980,[1] at Boston, Massachusetts.

Upon an original charge filed on April 17 in Case 1-CA-17394 by Teamsters Local 829, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), and amended on May 15; and upon a charge filed on June 3 in Case 1-CA-17534 by Jean Nelson, Robert S. Fuchs, Regional Director for Region 1 of the National Labor Relations Board (the Board), issued an order consolidating cases, amended complaint, and notice of hearing on June 24.

In essence, the consolidated amended complaint alleges that the Employer violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act), by circulation of an employee poll asking employees whether they intended to participate in a strike and by conditioning work opportunities and receipt of wages due upon the employees' participation in said poll. Additionally, it is alleged that the Employer discriminated against employees in violation of Section 8(a)(3) of the Act by discharging nine employees named in the complaint, "and other unknown employees," because they engaged in activities on behalf of the Union "and/or because of their protected concerted activity in refusing to" participate in the alleged unlawful poll.

The Employer's timely answer to the consolidated complaint admitted certain matters but denied the substantive allegations that it committed any unfair labor practices.

All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and to meet material evidence, and to examine and cross-examine witnesses, to present oral argument, and to file briefs. I have carefully considered the contents of the briefs filed by counsel for the General Counsel and the Employer's counsel.

Upon consideration of the entire record and the briefs and my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Based on stipulations between counsel, and the Employer's admissions in its answer, there is no issue as to jurisdiction or labor organization status.

In the regular course and conduct of its business of providing transportation services by automobile, van, and other vehicles, the Employer annually purchases gasoline and automotive products valued in excess of $50,000 indirectly from points located outside the State of Massachusetts, the Employer's incorporation and principal office and place of business. Accordingly, I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The operative facts are virtually uncontested. Thus, the following recitation is a composite of relevant unrefuted oral testimony, supporting documents and other undisputed evidence. Wherever material conflicts exist, they are resolved. Not every bit of evidence is discussed. Nonetheless, I have considered all of it together with all arguments of counsel. Omitted matter is considered irrelevant or superfluous.

A. *Background*

The Employer transports special education students between their homes and public and private educational institutions throughout a broad geographical area in Massachusetts.

Overall, the Employer uses approximately 850 station wagons for such transportation of approximately 7,000 students from their homes to schools situated outside their school districts.

Approximately 95 percent of the Employer's services are performed pursuant to legislative mandate. Additionally, on August 8, 1978, the Massachusetts Superior Court, County of Suffolk, issued a judgment against the Employer. The court commanded the Employer, *inter alia*, to provide the aforesaid transportation services for special education students of the city of Boston through August 31, 1980. Over 200 vehicles are used to service Boston.

At all material times, the Union has been the certified collective-bargaining representative of all the Employer's drivers of motor vehicles in the greater Boston and greater Springfield, Massachusetts, locations.

[1] All dates hereinafter are 1980, unless otherwise stated.

B. *Scenario of Events*

In March, the Employer and Union engaged in collective bargaining. No agreement on contract terms was reached.

On April 7, the Employer issued a letter to its drivers. In salient part, the letter observed "the Company is informed that the Union is planning a meeting of the drivers on April 13. The Union has indicated that it will ask the drivers to vote on whether to call a strike."

In fact, the Union conducted a membership meeting on April 13. The membership was asked to vote on the Employer's last contract offer. Its approval had not been recommended by the union officers. The membership overwhelmingly voted to reject the Employer's offer. Also, it was voted to strike.

There was considerable agitation among the union members to strike at once. However, the Union's secretary-treasurer, Martin J. Dunlap, told the membership that no strike could begin until authorized by the International Union. Dunlap told the members it might take 2-3 weeks for receipt of such authorization.[2] The membership meeting adjourned without any date having been set for a strike to begin.

Customarily, the Employer granted vacation to the drivers to coincide with school vacations. Thus, April 21-27 was scheduled as a period of vacation. During vacations, the drivers normally had been permitted to retain the vehicles to which they were assigned at their homes. (This was also the case for the nights between workdays.)

According to the uncontradicted testimony of the Employer's vice president, Paul Sullivan, rumors that a strike would begin on April 28, the first workday after the upcoming vacation, had "widely circulated" immediately after the Union's April 13 meeting. Accordingly, Sullivan testified that "the Company attempted to find out which employees would be returning to work after the school vacation, for whatever reason, whether it be that they decided not to work any more, or whatever they chose." Sullivan claimed the Employer's overriding concern was that it have sufficient drivers available to perform its mandated activities.

To implement its goal, the Employer directed supervisory personnel[3] to circulate a poll among the drivers. Sullivan further testified, without contradiction, that the supervisors were instructed to ask the drivers to complete a form and to exert no pressure on them. If any driver declined to sign the form, then the supervisors were told to retrieve the vehicle assigned to those drivers.

On April 16 and 17, the supervisors[4] spoke to the drivers as instructed. The full text of the form the drivers were asked to sign follows:

TO THE DRIVERS OF OUR SPECIAL CHILDREN

A STRIKE MAY BE CALLED AGAINST TMC AND TMC NEEDS TO INSURE THAT OUR SPECIAL CHILDREN SHALL BE TRANSPORTED TO AND FROM SCHOOL

PLEASE FILL OUT THE FORM BELOW INDICATING YOUR INTENTION WITH RESPECT TO THE POSSIBLE STRIKE.

(1) I shall return to work on April 28th, 1980, and *shall work for at least two weeks after that date, regardless of whether or not a strike is called.* By so agreeing, TMC will allow me to keep it's station wagon for my use during the April school vacation. In the event I do not live up to these promises, I agree to pay to TMC as a rental for the station wagon, a sum of $25.00 per day plus 35 cents per mile for the nine days beginning April 19 through April 27, 1980, and for any days thereafter that I do not work and retain possession of the Company's station wagon. I further agree that the payment for this rental of the Company station wagon may be offset and withheld from any wages TMC owes me and I will remain liable for any remaining balance. [Emphasis supplied.]

Print Name Signature
Date Employee# Car#

OR

(2) I do not agree both to return to work on April 28, 1980, *and to work for at least the next two weeks after that.* I shall return the TMC station wagon to TMC's Medford office on April 18, 1980, immediately after the completion of my afternoon run at which time I will receive my weekly paycheck. Failure to return the vehicle at the time and place specified above will result in the same rental charges under the same terms and conditions as outlined in number (1) [Emphasis supplied.]

Print Name Signature
Date Employee# Car#

In addition to retrieving the vehicles of the drivers who would not sign the form, the supervisors were to take the same action regarding the vehicles of the drivers who signed paragraph (2) of the form.

Some of the alleged discriminatees named in the complaint testified regarding their involvement in the poll and retrieval of their vehicles.[5] The relevant testimony of each is uncontradicted. Thus, Carol Budinger testified she refused to sign the form on April 17 and resisted the Employer's efforts to retrieve her vehicle. She parked it in her garage, contrary to her normal practice of keeping

[2] In fact, approval to strike was received on May 19.

[3] Based on a stipulation of the parties and the record as a whole, I find the following to be supervisors within the meaning of the Act. Richard Zimmerman, president; Paul Sullivan, vice president; W. R. Reardon, supervisor; Virginia Greenleaf, supervisor; Joyce Hartman, supervisor; Edward Peters, supervisor; Mary Putney, supervisor; and Tom W. Clisham, title unclear.

[4] Based on Sullivan's testimony that the following other personnel also had been directed to circulate the poll, I find each of them to be agents of the Employer. John Clisham, personnel and safety supervisor; Walter Clisham, William Carlolucci, Henry Watt, Trudy Camblin, and Robert Clancy.

[5] Named discriminatees Frances Coteleso and Pamela Pava were not called to testify.

it in her driveway. Ultimately, she relinquished the vehicle with police, called at her request, to witness the event.

Linda Cassetta presented vague testimony concerning the form. Cassetta first testified that she refused to sign the form. At a later point in her testimony, Cassetta claimed she thinks she signed a form declaring she would strike (par. 2) and agreeing to turn in her vehicle. In any event, the Employer retrieved the vehicle by 6 p.m. on April 18.

Pauline Hurley testified that she refused to sign the form when first asked on April 16. Hurley testified, without contradiction, that her supervisor, Joyce Hartman,[6] called Hurley at home and insisted that Hurley sign the form. Hurley again refused. According to Hurley, Hartman then said that Hurley was fired and the Employer would retrieve her vehicle. Hurley responded "fine." Hurley testified that later that night she observed her vehicle being removed from her yard.

Joanne Ludwig testified that she was handed the form by Personnel and Safety Supervisor John Clisham who asked her to read and sign it. Ludwig told Clisham she believed the situation to be unfair. According to Ludwig, Clisham responded "if you don't sign I have to take your key." A long discussion ensued. Ludwig finally signed paragraph (2) of the form.

Lorraine McCue testified that on April 16 Walter Clisham[7] presented the form to her. Clisham said, "sign and be on your way." McCue read the form. She refused to sign. Clisham persisted. McCue claimed it was unconstitutional. Clisham threatened to take McCue's vehicle. McCue responded that each has to do his job. Clisham suggested McCue sign the form and write "but if there is a strike I will not work." McCue refused to sign the form.

McCue testified that later that day Pat McDermott[8] called McCue at home and asked her to reconsider signing the form. McCue declined. McDermott said if McCue does not sign the form the Employer will retrieve her vehicle. McCue asked if she was fired. McDermott responded, "No, we are just taking the car."

According to McCue, a few minutes later she was called again by one Harff.[9] Harff asked McCue to sign the form, saying it means nothing. McCue retorted, "If it means nothing, why the big deal?" Again, McCue declined to sign. Harff said he had no choice but to pick up McCue's vehicle. According to McCue, her vehicle had been retrieved by the Employer during the phone conversation with Harff.

According to McCue, she was phoned by Supervisor Hartman about 15 minutes later. Hartman said she heard that McCue quit. McCue said, "No, I believe I was fired." Hartman said McCue was not fired. McCue commented, "If I was not quit or fired there is no car. How do I work tomorrow?" Hartman responded, "Evidently you cannot. Why don't you sign?"

Jean Nelson, the Charging Party in Case 1-CA-17534, testified that she obtained Dunlap's opinion that the form was illegal after Supervisor Putney requested Nelson, on April 17, to meet for the purpose of signing. Nelson met Putney on April 18. She asked Putney what would happen if she did not sign. Putney responded that Nelson would have to deliver her keys to Putney and leave her vehicle at the Employer's premises. Dunlap had advised Nelson to sign the form because it "doesn't mean anything." Nelson affixed her signature to paragraph (1) of the form and added the words "under duress." Nelson retained her vehicle.

Marlene Switzer testified that she was called by office clerical employee Trudy Camblin to report on April 17 to sign the form. Switzer inquired regarding the form's content.[10] Camblin said it was "just to see whether or not" Switzer "was going to strike." Switzer told Camblin she had not yet decided and would not sign any form she could not bring home to consider.

The next day, Camblin again called Switzer. Camblin asked whether Switzer signed the form. Switzer said she had not done so. Camblin said if Switzer would not sign the Employer would retrieve Switzer's vehicle. Switzer remained steadfast. Camblin advised Switzer's vehicle would be retrieved that evening. In fact, the Employer retrieved Switzer's vehicle about 10 p.m. that night, April 17.

Based on the testimony of the foregoing alleged discriminatees, coupled with that of Sullivan and other employer witnesses who testified on the same subject, I find that between April 16–18 the Employer circulated a poll among its drivers and retrieved their motor vehicles whenever a driver declined to sign the Employer's form and when drivers signed paragraph (2) of the form.

Richard Zimmerman is the Employer's president. Sometime during the week of April 14, a news report appeared in a local newspaper, the South Middlesex News, in which it was reported that Zimmerman opined the Union would not be able to carry out an effective strike. Zimmerman was quoted as saying the Employer intended to fulfill its transportation commitments. Also, he was quoted as having speculated no strike would occur and expressed his belief that only a minority of the drivers advocated a strike.

On April 22, the South Middlesex News published an article which reported the results of an interview with Charging Party Nelson. Nelson was reported to have complained the Employer was intending to intimidate the drivers by means of the poll. Moreover, the article attributes to Nelson an accusation that Zimmerman "has attempted to stymie the drivers' union-organizing efforts by ordering drivers to return cars to the firm just before they are scheduled to hold a meeting. . . ." Also, the article indicates that Nelson said, "Zimmerman has refused

[6] Hartman did not appear as a witness.

[7] His title and position are unknown. However, I have found him to be an agent of the Employer. It is possible this individual, in reality, is John Clisham. In any case, he is undisputedly at least an agent of the Employer.

[8] McDermott is identified as Hurley's supervisor.

[9] Harff is not otherwise identified. However, the Employer's brief refers to him as McCue's supervisor.

[10] Camblin did not testify. I credit Switzer's candid and articulate account of her conversation with Camblin.

to provide the Union with an up-to-date list of employees."[11]

Nelson, during direct examination, testified that she telephoned Supervisor Putney on April 21. Nelson asked why she had not received her last paycheck. Nelson testified that she asked Putney "if Trickey Dick [referring to Zimmerman] is playing fun and games again because he wants to see how many girls signed the . . . [poll]." According to Nelson, Putney answered, "Yes, but you signed. Don't worry about it. You'll get your check." (This direct testimony was offered by the General Counsel to prove the allegation contained in paragraph 8(d) of the complaint. That paragraph alleges that Putney "told Nelson that Zimmerman was playing games with the payroll checks until everyone signed . . . [the poll]."

Nelson was more comprehensive and specific when cross-examined concerning the April 21 conversation with Putney. Nelson's complete cross-examination testimony on this subject follows:

> Q. (By Mr. Welensky). Now did Mary Putney say to you, on or about April 21, 1980, on the telephone, that Mr. Zimmerman was "playing games with the payroll checks until everyone signed the notice?
>
> A. *I* said that. Mary just agreed and said "yes." [Emphasis supplied.]
>
> Q. The question was, did Mary Putney make that statement to you?
>
> A. No, I made it to her.
>
> Q. And did she say "something like that?"
>
> A. She said, "Yes, but you don't have to worry about your check."

Putney testified. She denied saying that Zimmerman was playing games with the payroll checks until everyone signed. I find Putney's denial consistent with the explicit description of the conversation related by Nelson during her cross-examination. Accordingly, I adopt Nelson's cross-examination description of the April 21 conversation with Putney as my findings of fact.

Sullivan testified that, on April 22, the Employer was not yet aware of a definite date on which a strike might begin. However, Sullivan claimed that there were rumors that the strike was set for a day or two after the vacation.

Sullivan prepared letters to each driver who signed paragraph (2) of the Employer's poll and also to those drivers who totally refused to sign the form. The letters were identical, as follows:

> If you desire to return to work Monday, April 28, 1980, please contact Claire Welby at 395-8604 by Friday noon, April 25, 1980. If we do not hear from you, we assume you have no interest in continuing to work for Transportation Management Corporation.

The letter was sent to alleged discriminatees Cassetta, Hurley, Ludwig, and McCue.

There is no evidence that the April 22 leter had been addressed to alleged discriminatees Budinger, Coteleso, Nelson, Pava, or Switzer.

Letters were addressed to the following drivers, who apparently received them, as indicated by certified mail postal return receipts in the record:

1. Belanger, Mary
2. Coutts, Janet
3. Duval, Cora
4. Esposito, Janet
5. Johnson, Judith
6. Leonard, Patricia
7. Martinez, Claire
8. Motte, Lorraine
9. Mullaney, Linda
10. Sherburne, Ruth

Additionally, Sullivan's April 22 letter was addressed to the following drivers. It is uncertain whether those listed below actually received Sullivan's letter. The record contains no certified mail return postal receipts. Wendy Dixon's and Barbara Kane's envelopes were stamped unclaimed.

1. Anderson, Sally
2. Ballard, Theresa
3. Bower, Catherine
4. Dixon, Wendy
5. Dwyer, Sandra
6. Greene, Doris
7. Hogsett, Clarissa
8. Houghton, Flora
9. Kane, Barbara
10. Macklin, Etta M.
11. McIrvin, Mary G.
12. Musto, Marianne
13. Newton, Pamela
14. Nicolosi, Mary M.
15. O'Neil, Margaret
16. Robbins, Leila
17. Smith, Connie
18. Vibert, Gail

Over the Employer's objections, I received in evidence copies of the April 22 letter addressed to the drivers identified above. The General Counsel orally asserted these 28 individuals comprise that group of alleged discriminatees identified as "other unknown employees" in paragraph 9(a) of the complaint.[12]

Welby, Zimmerman's secretary, testified that she received telephone calls from a number of employees who received the April 22 letter. She testified that she merely asked each employee whether their answer to Sullivan's letter was yes or no. Welby claimed she advised drivers who indicated they would return to work on April 28 to contact their supervisors. Welby further testified she told those employees to report on April 27 to pick up their vehicles.

Welby was not cross-examined on this aspect of her testimony. However, Cassetta, Hurley, and McCue testified that they called Welby in response to Sullivan's April 22 letter. The testimony of McCue and Cassetta[13] conflicts with Welby's.

Cassetta testified that Welby asked her whether or not she signed the form. Cassetta claimed she told Welby she had signed to "get rid of" the person who presented the

[11] Each newspaper article discussed above contains other matters relating to the parties' positions. However, only those matters having direct bearing on the issues before me have been abstracted. The latter material relates to the General Counsel's assertion there exists specific evidence of unlawful motivation regarding the Employer's treatment of Nelson. In view of the foundation used to resolve the issue of alleged discrimination I deem it unnecessary to pass upon the separate motivational theories applied by the General Counsel to Nelson, Budinger, and Switzer.

[12] Upon receipt of such evidence, I advised the Employer's counsel I would entertain a request for time to enable the Employer to prepare defense evidence to these 28 individuals explicitly named as discriminatees for the first time at the hearing. No such request or motion was made.

[13] Hurley presented no details of her conversation with Welby.

form to her. Welby responded, "So you don't want to return to work." Cassetta claimed she signified she did want to go back to work unless she had been discharged. According to Cassetta, Welby said that Cassetta's supervisor would contact her over the weekend about returning to work. Cassetta had not heard from her supervisor. She explicitly denied that Welby told her to call the supervisor.

McCue testified that when she called on April 23 Welby commented "So you're not going to strike!" McCue responded, "I didn't say that, but I want to return to work Monday." Welby responded, "Fine, your supervisor will contact you." McCue further testified that her supervisor called later. He said that he heard she was returning to work Monday and that she decided to sign the form. McCue told the supervisor she had not decided to sign. She asked whether her supervisor had her run. The supervisor responded, "I don't know what to tell you. Why don't you just sign." McCue claimed she heard nothing further from her supervisor.

On April 25, McCue called the Employer and spoke to John Clisham. McCue asked for her run. Clisham asked whether the Employer had her car. McCue said yes. Clisham told her that "in order to pick up your car you have to sign . . . [the poll]. This is a company condition." McCue remained steadfast in her refusal to sign. Clisham testified on the Employer's behalf, but was asked no questions concerning the April 25 conversation with McCue. I credit McCue.

As will be further developed in the Analysis section, *infra*, the resolution of credibility between Welby on the one hand, and Cassetta and McCue on the other, is material to the motivational issue. In this credibility contest, I credit each of the alleged discriminatees. Welby's brief account of her dealings with the other employees regarding the April 22 letter does not bear the ring of total veracity. It is illogical. In light of the Employer's admitted desire for assurances its drivers would report to work on April 28, and remain there, in the words of the poll, "for at least two weeks after that date," it is plausible to believe the more spontaneous and comprehensive testimony of McCue and Cassetta, who claimed Welby had some conversation with them in which Welby inquired as to the certainty of their intentions to work the requested time. As reported, Cassetta candidly told Welby she signed the poll in an equivocal manner. Welby's response, as presented by Cassetta, is framed in words expected of one who wants assurance of Cassetta's position. Cassetta's response to Welby's claimed response is natural and plausible. She said she wanted to return to work unless she had been terminated. There is no evidence that Cassetta had provided information that she would work the full 2 weeks. Thus, it is more logical that Welby would have told Cassetta, as the letter claimed, that Cassetta's supervisor would contact her, than to believe Welby's testimony that she asked Cassetta to call her supervisor.

Similarly, McCue's comprehensive narration of her dealings concerning the April 22 letter reflects she, too, explicitly equivocated as to her strike intentions. According to McCue, she only assured Welby of her desire to work on April 28. McCue specifically reserved her thoughts on striking. Once again, it is more plausible to believe that Welby, faced with this uncertainty, would have told McCue her supervisor would call. This conclusion is buttressed by the uncontroverted testimony of McCue that she, in fact, had later received such a call.

Based on the foregoing comparison of the testimony of Welby, McCue, and Cassetta, I conclude that, at most, Welby asked only those employees *who left no doubt* of an intention to work on April 28 and the succeeding 2 weeks to call their supervisors.

There is evidence of some additional contact between some of the alleged discriminatees and Zimmerman. Thus, Budinger testified that she spoke in person with Zimmerman on April 25, and Zimmerman told her he was angry that she called the police to monitor the Employer's retrieval of her station wagon and would see to it that Budinger would never again drive for him or any other organization transporting children. Ludwig spoke to Zimmerman on April 25. He remonstrated with Ludwig over the fact that she had telephoned the parents of the students she drove to apprise them she had no vehicle, and he complained because she had indicated she would return to work only if given her former route. Switzer testified that she spoke with Zimmerman, also, on April 25. During that conversation, she questioned the legality of retrieving the vehicles and inquiring as to the employees' strike sentiments. He challenged her right to contest those moves.[14]

Finally, Cassetta, McCue, and Hurley testified that they had visited the Employer's premises together on April 30. They had individual conversations with Zimmerman. McCue's is noteworthy. McCue testified, without contradiction, that Zimmerman observed, "So you want to drive." This was an apparent reference to her earlier reported April 23 conversation with Welby during which she told Welby of her desire to report for work on April 28,[15] and also to McCue's April 25 conversation with John Clisham. McCue testified she responded that was true. Zimmerman then remarked, "How can you say that when you refuse to sign [the poll]?"

C. *Analysis*

1. Interference, restraint, and coercion

(a) In paragraph 8(a) of the complaint it is alleged that the Employer violated Section 8(a)(1) of the Act by circulation of the employee poll.

The General Counsel, citing *Preterm, Inc.*, 240 NLRB 654 (1979), asserts circulation of the poll was unlawful because the Employer (1) did not fully explain the poll's purpose, and (2) did not give the employees assurances against reprisal. Also, the General Counsel claims the poll "conducted by . . . [the Employer] . . . to ascertain the Union's sympathies of each of its employees . . .

[14] Zimmerman did not testify. Accordingly, and inasmuch as I find Budinger, Ludwig, and Switzer otherwise credible, their testimony regarding their April 25 conversations is adopted. Nonetheless, I find it of probative value only upon the General Counsel's alternate motivational agreements which I find unnecessary to pass on.

[15] The later conversation between McCue and her supervisor involved the latter's unsuccessful solicitation of McCue to sign the poll.

constituted a modern but not so subtle version of a 'yellow dog contract.'"

The Employer contends the poll was lawful. Citing *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967), *inter alia*, the Employer claims it complied with the Board's standards for employee polling. Additionally, the Employer asserts the poll was justified by business considerations. In this regard, the Employer claims its business of transporting special needs students, in effect, renders its operations quasi-public in character. Thus, the Employer argues its work is of a critical and essential nature and the combination of legislative and judicial mandate nurtured the need to assure uninterrupted continuation of the Employer's services.

I find the Employer's contentions only superficially appealing. The efficacy of assuring the students' transportation cannot be doubted. Where there is a reasonable basis for believing a strike is imminent, an employer has a legitimate need to determine its ability to adequately staff its operations. *W. A. Sheaffer Pen Company, Division of Textron, Inc.*, 199 NLRB 242 (1972), enfd. 486 F.2d 180 (8th Cir. 1973). In such a context, interrogation as to employees' strike intentions is not *per se* violative of the Act. *Industrial Towel & Uniform Service Company*, 172 NLRB 2254 (1968) (overruling a trial examiner's conclusion of a violation set forth at 2259).

Whether the instant Employer had a legitimate need to poll the employees is a factual question. The evidence shows that on April 13 the employees voted to strike. The Union's secretary-treasurer told employees actual strike authority yet needed to be obtained. No date had been established for a strike to begin. Admittedly, the Employer decided to circulate its poll because of "widely-circulated" strike rumors. In fact, the final strike authorization was received on May 19, approximately 1 month *after* the strike vote and the alleged unlawful poll.

In my opinion, the scenario herein is insufficient to support a conclusion that the Employer could have had a reasonable basis for believing a strike was imminent. Such a conclusion, in the circumstances herein, would be based on speculation, conjecture, and surmise. Clearly, there is no evidence to prove a strike had been scheduled to begin April 28. The Employee had no reliable basis on which to make such a conclusion. Accordingly, I conclude the Employer lacked a valid justification for the conduct of its poll.[16]

The test for 8(a)(1) conduct is whether it reasonably tends to interfere with, restrain, and coerce employees in the exercise of their statutory rights. *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492 (1979); *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

In the absence of a legitimate basis to conduct the poll, it is appropriate to examine its import. Undeniably, the responses to the poll effectively comprise a betrayal of the employees' sentiments concerning protected activity. Making public such sentiments inherently subjects employees to fear of discrimination and reprisals against them. Such conduct is unlawful. *L. S. Ayres & Company, a Division of Associated Dry Goods Corporation*, 221 NLRB 1344 (1976). In this framework, the absence of direct evidence that the supervisors made threats of reprisal, or engaged in other specific conduct violative of Section 8(a)(1) is of little consequence.

Upon all the preceding, I find that the record sufficiently establishes that the Employer violated Section 8(a)(1) of the Act, as alleged in paragraph 8(a) of the complaint.

Assuming, *arguendo*, it is held the facts reasonably establish a strike was imminent, there is another ground for finding the poll violative of Section 8(a)(1). The poll exceeded the bounds of permissible inquiry. Indeed such basis attacks the very core of employee rights. However virtuous and commendable the Employer's goal of assuring uninterrupted educational opportunities to the special needs students and compliance with court mandate, it is clear the poll elicited employee forbearance and waiver of their statutory right to strike.[17]

Thus, paragraph (1) of the poll form required responding employees to commit themselves to forgo participation in a strike for a full 2 weeks. (See italicized language of the poll form.) It is true that employees could have signed paragraph (2) of the form. However, when they did so, or totally refused to participate in the poll, their vehicles were retrieved. This act effectively deprived them of the tools of their trade. They could not work. Thus, the freedom of choice which the Employer espouses is illusory.

In short, I conclude the vice inherent in the Employer's poll is demonstrated by the requirement the employees effectively were compelled to waive their right to strike. It is inescapable that such forbearance interferes with the employees' Section 7 rights.

(b) Complaint paragraph 8(b) alleges the Employer unlawfully conditioned an employee's return to work after vacation upon participation in the poll.

This allegation is based on McCue's testimony that on April 25 John Clisham told her she would have to sign the poll in order to pick up her vehicle. As previously noted, Clisham was not interrogated on this aspect of McCue's testimony. Thus, McCue's testimony stands uncontroverted. Moreover, I find McCue generally credible. Based on her testimony, it is clear Clisham explicitly conditioned McCue's return to work upon her participation in the poll.

I have found the poll to be unlawful. It follows that participation in it lawfully could not be compelled. Such a requirement underscores and aggravates the polls' unlawful character.

Accordingly, I find the Employer violated Section 8(a)(1) of the Act by conditioning McCue's return to work upon participation in the poll.

(c) The complaint alleges that on April 30 the Employer attributed McCue's failure to return to work after vacation to her activities regarding participation in the poll. This allegation is based on McCue's testimony that Zimmerman told her she did not want to work for him anymore because she refused to sign the form.[18] Zimmer-

[16] Cf. *Roadhome Construction Corp.*, 170 NLRB 668, 674 (1968), where polling of job applicants occurred while a strike was in progress.

[17] This matter will be more fully addressed in sec. II,C, par. (2), *infra*.

[18] The explicit substance of Zimmerman's remarks appears in sec. II, B, *supra*.

man did not testify. Thus, McCue's testimony is uncontradicted.

The Employer suggests that Zimmerman's words, in isolation, do not portray a violation of the Act. However that may be, I conclude Zimmerman's words to McCue derive meaning from the entire context in which uttered. Thus, McCue previously had remained steadfast in her refusal to participate in the poll when Hartman, Harff, and then Clisham implored such participation on April 25. Thus, Zimmerman's words comprise an extension, and an affirmation, of those earlier contacts between McCue and supervisory personnel. In this backdrop, Zimmerman's April 30 comments to McCue clearly imply that her failure to return to work after vacation is directly attributable to her refusal to sign the poll. I conclude Zimmerman's observation, "How can you say that [McCue wanted to drive] when you refused to sign" is tantamount to Zimmerman telling McCue she could not return to work unless she participated in the unlawful poll. Accordingly, I find merit to paragraph 8(c) of the complaint.

(d) It is alleged in complaint paragraph 8(d) that the Employer violated Section 8(a)(1) when Putney told an employee that Zimmerman was playing games with the payroll checks until all the employees signed the poll.

As previously observed, both Nelson and Putney testified as to their conversation on April 21. Nelson's verbatim account, *supra*, presents substantial agreement between them on critical matters. Thus, both Nelson and Putney agree that the references to whether Zimmerman was "playing games" with paychecks emanated from Nelson, not Putney.

Nonetheless, when testifying for the Employer, Putney did not seek to establish she attempted to repudiate the accuracy of Nelson's remarks to her. Indeed, the text of the conversation clearly shows Putney explicitly uttered words signifying agreement with Nelson's supposition. Thus, Putney answered, Zimmerman was doing "something like that." I conclude that Putney's response effectively constitutes adoption of Nelson's comments as her (Putney's) own. It signifies Putney's concurrence in their accuracy. Such adoption results in implied linkage of delayed paychecks to failure to participate in the unlawful poll.

The Employer relies on the undisputed testimony that it was Nelson, instead of Putney, who raised the issue. Such reliance is misplaced. It is based on a narrow and too literal interpretation of the events. More significant is Putney's failure to disavow Nelson's remarks. Such disavowal readily could have been made. Instead, Putney clearly left Nelson with the impression that receipt of wages was tied to participation in the poll. I consider such an impression signifies the undercurrent of pervasive illegality engendered by the Employer's persistent efforts to obtain widespread employee participation in the unlawful poll.

Upon the foregoing, I conclude that the Employer violated Section 8(a)(1) of the Act, as alleged in paragraph 8(d) of the complaint.

2. Discrimination

The General Counsel contends that each of the employees named in the complaint, together with the others to whom the Employer dispatched its April 22 letter, had been unlawfully discharged effective April 28, in violation of Section 8(a)(3) of the Act.

In defense, the Employer claims there is no evidence any employee had been discharged and that the record is devoid of evidence of discriminatory motivation.

Although not specifically explicated in such a manner, the General Counsel's theory of violation rests on the implicit claim that each of the alleged discriminatees was constructively discharged. Presumably, this is the logical result of the combination of (1) retrieving the vehicles from employees who refused to participate in the poll or participated but would not commit themselves to strike forbearance and (2) conditioning return of vehicles and work assignments for April 28 upon participation in the poll.

I agree with the Employer that there is no evidence that it took action to formally "discharge" any employee. However, the record amply reflects the Employer engaged in conduct which effectively deprived each affected employee of her former work opportunities. That action was in the form of (1) retrieval of their vehicles, the implements of their trade, and (2) conditioning a return of those vehicles upon the employees' participation in the poll. If such deprivation was motivated by unlawful considerations, then such action is discriminatory within the contemplation of Section 8(a)(3) of the Act.

Violations of Section 8(a)(1) support findings of unlawful motivation. Herein, I have found the Employer violated Section 8(a)(1) through various conduct involving circulation of and participation in the poll, an inquisition which I have found inherently coercive. Assuming, however, I am in error in those findings, 8(a)(1) violations are not necessarily a requirement of an 8(a)(3) finding:

> Actual motive, state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases . . . the trier of fact may infer motive from the total circumstances proved. . . . If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—at least where . . . the surrounding facts tend to reinforce that inference. [*Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966).]

The *Shattuck Denn* principle was quoted with approval by the Board in *Best Products Company, Inc.*, 236 NLRB 1024, 1025 (1978).

Moreover, support for a finding of unlawful motivation "is augmented [when] the explanation of the [employer's conduct] offered by the Respondent [does] not stand up under scrutiny." *N.L.R.B.* v. *Bird Machine Company*, 161 F.2d 589, 592 (1st Cir. 1947).

The key to uncovering the Employer's motivation lies in the circulation and *import* of the poll. First, the record

is replete with evidence that the Employer embarked on a course of conduct permeated by an unlawful theme. Thus, the virtually undeniable evidence reflects numerous instances where supervisors and other of the Employer's agents persistently, literally exhorted some of the alleged discriminatees to participate in the poll.

Next, the uncontroverted credible evidence proves that supervisory officials conditioned return of vehicles and employees to work on April 28 upon their participation in the poll.

Most impressive is that the Employer's repeated insistence upon participation in the poll made relinquishment of a statutory right a condition of further employment. Section 13 of the Act protects an employees' right to engage in lawful strikes. There is no allegation herein that the employees had contemplated, or engaged, in any type of unlawful strike. I have earlier observed that the polls' commitment to remain at work for at least 2 weeks is the equivalent of a waiver of the right to strike, albeit for a limited time. To have conditioned work opportunities upon such a waiver, as the Employer clearly did, inescapably interferes with the employees' statutory rights. (To exacerbate the situation, the poll sought to extract a financial penalty, though not implemented, for breach of the no-strike commitment.)

What is certain from all the evidence is that, unless the employees agreed to give up their right to strike, the Employer would neither provide them with the tools of their trade nor with work assignments.[19] Such a demand of the employees gives rise to a reasonable inference, which I make, that the Employer was motivated by unlawful considerations.

It is well established that employees are held to have been constructively discharged when their employer conditions future employment upon abandonment of their statutory rights. *Marathon Electric Mfg. Corp.*, 106 NLRB 1171, 1175 (1953); *Blue Cab Company and Village Cab Company*, 156 NLRB 489 (1965); *Ra-Rich Manufacturing Corporation*, 120 NLRB 503 (1958).

The record, viewed in its totality, persuades me that the Employer was motivated at all relevant times by a desire to stymie the strike activity of its employees. I consider the Employer's reliance on legislative and judicial imperatives does not excuse the inherent coerciveness of the poll. If actually motivated by those mandates, the Employer easily could have fulfilled its stated purpose and avoided going afoul of the Act by limiting the scope of its poll. Thus, the Employer simply could have inquired whether or not each employee intended to report for work on April 28. Instead, the Employer went further. It required the strike waiver. Accordingly, I conclude a defense based on the nature of the Employer's business does not stand up to scrutiny. Such defense simply did not dictate the Employer's apparent insistence on strike waivers.

The indicator of its true motivation—an unlawful one—is the requirement that each employee forgo her right to strike. Viewed in this light, I conclude the April 22 letter is a sham. Ostensibly, it offers employees a chance to return to work. However, the credited conversations between some of the employees and Welby, John Clisham, and other agents and supervisors of the Employer's, make it clear that a return to work was conditioned upon participation in the unlawful poll. Thus, the letter further punctuates the underlying illegality of the poll. The letter accentuates, rather than diminishes, the Employer's unlawful motivation. It set in motion the opportunity, which the Employer grasped, to solicit participation in the poll yet another time.

Finally, the Employer contends there is evidence to show some of the employees voluntarily gave up their jobs. I acknowledge some such evidence is contained in the record. However, I consider it of little probative value. Unlawful constructive discharges have been held to exist where employees quit their jobs after having been denied work normally available in situations analogous to the circumstances herein. *Jack Hodge Transport, Inc.*, 227 NLRB 1482, 1490–91 (1977).

Inasmuch as it is admitted that the April 22 letter was sent to all employees who either signed paragraph (2) of the poll form or who entirely refused to participate, I conclude each of those employees is entitled to the protection of the Act. This is so in spite of the fact direct evidence was not presented relative to whatever communications, if any, there might have been between them and the Employer's officials. It is admitted the Employer treated all such employees uniformly with regard to their participation in the poll. Thus, any effort to return to work would have been futile because of the Employer's conduct which made participation in the poll a precondition.

Upon all the foregoing, I conclude the General Counsel has satisfied his burden of proving a *prima facie* case of discrimination, by a preponderance of the evidence, that each of the employees named in the complaint (except Frances Coteleso and Pamela Pava),[20] in addition to each employee identified hereinabove who was sent an April 22 letter, was constructively discharged in violation of Section 8(a)(3). I further find the Employer has not adduced sufficient evidence to overcome the General Counsel's *prima facie* case. I consider the date of discharge to be April 28, the first date after the vacation and the unlawful poll when work normally would have been made available to each.

CONCLUSIONS OF LAW[21]

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act on April 17, 1980, by conducting a poll which re-

[19] As previously noted, the choice between signing par. (1) or (2) of the poll form, in reality, was no choice at all.

[20] As earlier noted, neither Coteleso nor Pava testified. Also, there is no evidence that either was employed by the Employer or received an April 22 letter.

[21] In view of these conclusions, the Employer's motion to dismiss the complaint allegations, on which I reserved ruling, is hereby denied except to the extent inconsistent with Conclusion of Law 9.

quired the employees to defer their right to strike for at least 2 weeks.

4. The Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act on April 25, 1980, when John Clisham conditioned McCue's return to work upon participation in the poll, found unlawful herein.

5. The Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act on April 30, 1980, when Richard Zimmerman impliedly conditioned McCue's return to work upon her refusal to participate in the poll, found unlawful herein.

6. The Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act on April 21, 1980, when Mary Putney signified to Jean Nelson that delivery of payroll checks of employees were being delayed because of their nonparticipation in the poll, found unlawful herein.

7. The Employer discriminated, in violation of Section 8(a)(3) and (1) of the Act, against the following employees by having constructively discharged each of them on April 28, 1980, for having refused and declined to waive their right to strike:[22]

1. Anderson, Sally
2. Ballard, Theresa
3. Belanger, Mary
4. Bower, Catherine
5. Budinger, Carol
6. Cassetta, Linda
7. Coutts, Janet
8. Dixon, Wendy
9. Duval, Cora
10. Dwyer, Sandra
11. Esposito, Janet
12. Greene, Davis
13. Hurley, Pauline
14. Hogsett, Clarisa
15. Houghton, Flora
16. Johnson, Judith
17. Kane, Barbara
18. Leonard, Patricia
19. Ludwig, Joanne
20. Macklin, Etta M.
21. Martinez, Claire
22. McCue, Lorraine
23. McIrvin, Mary G.
24. Motte, Lorraine
25. Mullaney, Linda
26. Musto, Marianne
27. Nelson, Jean
28. Newton, Pamela
29. Nicolosi, Mary N.
30. O'Neil, Margaret
31. Robbins, Leila
32. Sherburne, Ruth
33. Smith, Connie
34. Switzer, Marlene
35. Vibert, Gail

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. There is no evidence to prove the discriminatory allegations pertaining to Frances Coteleso and Pamela Pava.

[22] Although no motion was made to amend the complaint to specifically add the names of the alleged discriminatees previously alleged only as "other unknown employees," the record clearly reflects each of these individuals comprise all the employees who either declined to participate in the unlawful poll or who participated by signing par. (2) of the form. Sullivan's admission each such employee received the uniform treatment involving retrieval of her vehicle shows each belongs to the class of employee to whom the constructive discharge theory applies. Thus, the issue has been fully litigated. The Employer, as previously noted, did not request an opportunity to prepare separate defenses to the General Counsel's evidence, though fully apprised of its purpose and given an invitation to make such a request.

THE REMEDY

Having found that the Employer violated Section 8(a)(3) and (1) of the Act, I shall recommend it cease and desist from engaging in such conduct in the future and affirmatively take such action as will dissipate the effects of its unfair labor practices.

Because the individuals named above in Conclusion of Law 7 have been found to be constructive dischargees, my Order shall require the Employer to offer full and immediate reinstatement[23] to each of them to the former or substantially equivalent job held by each, without prejudice to her seniority or other rights and privileges.

Because the 35 named individuals were unlawfully terminated, my Order shall also require the Employer to make whole each of those employees for any loss of earnings they may have suffered as a result of her constructive discharge by payment of a sum equal to that which each would have earned, absent the discrimination, to the date of the Employer's offer of reinstatement. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

The record contains no evidence of a proclivity of the Employer to violate the Act. Accordingly, I conclude it is unnecessary that the Order contain broad proscriptive language. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). However, the Employer shall be ordered to refrain from, in any like or related manner, interfering with, restraining, and coercing its employees in the exercise of their Section 7 rights.

Upon the above findings of fact, conclusions of law, and the entire record of this case and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[24]

The Respondent Transportation Management Corporation, Medford, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Conducting polls among its employees in violation of the Act.

(b) Conditioning work opportunities and receipt of wages upon the participation of employees in unlawful polls.

[23] The Employer urges Budinger, Ludwig, and Nelson forfeited their reinstatement rights by virtue of certain misconduct which involved calling police to monitor retrieval of vehicles, having difficult, disagreeable, and disrespectful attitudes or having quit. I have examined each such assertion and conclude none warrants denial of reinstatement. Compare: *Hedstrom Company, a subsidiary of Brown Group, Inc.*, 235 NLRB 1198 (1978); *Coronet Casuals, Inc.*, 207 NLRB 304 (1973). Also *Jack Hodge Transport, Inc., supra.*

[24] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Requiring its employees to waive or forgo their right to engage in a lawful strike.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of any of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to each of the individuals named above in Conclusion of Law 7 to her former job or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to her seniority or other rights, privileges, and benefits, and make each of them whole in the manner described above in the section entitled "The Remedy" for any loss of pay or other benefits suffered by reason of their constructive discharges.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and interest due under the terms of this Order.

(c) Post at its Medford, Massachusetts, location, copies of the attached notice marked "Appendix."[25] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by an authorized representative of the Employer, shall be posted by the Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material.

The record reflects that the vast majority of unit employees do not regularly visit the Employer's premises. The employees essentially work out of their homes. Additionally, they are dispersed over a broad geographical area in Massachusetts. Accordingly, I conclude to effectively convey the message contained in the notice provision should be made to assure all employees are aware of it. *Amshu Associates, Inc., and Spring Valley Garden Associates*, 218 NLRB 831, 836-837 (1975). Thus, the notice to employees, marked "Appendix," shall be prepared by the Regional Director in sufficient numbers to permit mailing to each unit employee. Such notices shall be forwarded by the Regional Director to the Employer. Within 5 days of receipt thereof, the Employer shall mail a copy of the notice to each of its drivers then within the bargaining unit, including each of the 35 discriminatees. Upon completion of such mailing, the Employer shall forthwith submit to the Regional Director a list of the name and address of each employee to whom the notice was mailed, together with a certification signed by an authorized Employer representative that the Employer has completed the mailing in accordance with the terms of this Order.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Employer has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations relating to Frances Coteleso and Pamela Pava be, and they hereby, are dismissed.

[25] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."